85-1050

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JACK F. TRAHAN,
Appellant
v.

EMMA J. TRAHAN,
Appellee

ON APPEAL FROM THE
COURT OF APPEALS OF TEXAS
FOR THE
THIRD SUPREME JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTIONS PRESENTED

1. Is the application of Texas community property and partition laws to a 1963 divorce, thereby dividing military retirement benefits previously vested solely in Appellant by federal law and final judgment applying such federal law, repugnant to the Constitution and laws of the United States?

2. Did the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408, annul the decision of this Court in *McCarty* v. *McCarty*, 453 U.S. 210 (1981) in its entirety and retroactively permit establishment of state community property concepts in place of the pre-emptive federal statutory plan described in *McCarty* so as to permit partition of retirement benefits arising from a marriage that ended in divorce in 1963?

3. Is the award of a money judgment against Appellant under the facts of this case a taking without compensation or a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Supreme Judicial District of Texas (A-1) is reported at 682 S.W.2d 332. The denial of review by the Texas Supreme Court (A-14) and the refusal of rehearing by the Texas Supreme Court (A-15) were without opinion. The opinion of the Texas Supreme Court on the appeal of the prior case (A-20) is reported at 626 S.W.2d 485 (Tex. 1981).

STATEMENT OF JURISDICTION

This Court's appellate jurisdiction is invoked under 28 U.S.C. § 1257(2) because the statutes of the State of Texas defining community property and creating a presumption in favor of community property (Texas Family Code §§ 5.01 and 5.02 and their predecessors) and providing for partition of property have been applied in a way repugnant to the laws of the United States and in the face of appellant's continued and consistent assertion that such state laws were pre-empted by federal law and could not be used to create a community property right for appellee in Major Trahan's non-disability retirement benefits at the time of the divorce of appellant and appellee on January 22, 1963. This is an action to partition community property alleged to have existed by virtue of state law at the time of a 1963 divorce. That the 1963 divorce is the basis for the partition is expressly stated in the trial court judgment (A-40). Appellate jurisdiction is supported by *McCarty* v. *McCarty,* 453 U.S. 210, 69 L. Ed.2d 589, 101 S. Ct. 2728 (1981) and *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 66 L.Ed 239, 42 S.Ct. 106 (1921).

The judgment sought to be reviewed was entered by the Court of Appeals of Texas, Third Supreme Judicial District, on October 24, 1984 (A-12) and was accompanied by written opinion (A-1). Motion for rehearing in that Court was over-

ruled on December 19, 1984 (A-13). Application for review by the Supreme Court of Texas (by Petition for Writ of Error) was made and was refused with the notation, no reversible error, on June 12, 1985 (A-14). Motion for rehearing in the Supreme Court of Texas was denied on September 18, 1985 (A-15) and is the final judgment or decree rendered by the highest court of a state in which a decision could be had. This case is being docketed within 90 days of denial of rehearing by the Texas Supreme Court. Notice of appeal was filed in both the Supreme Court of Texas and the Court of Appeals of Texas for the Third Supreme Judicial District sitting in Austin, Texas on November 27, 1985 (A-16, 18). Under regular Texas practices the record of the case has been returned to the Court of Appeals of Texas, Third Supreme Judicial District, Texas Supreme Court Building, Austin, Texas 78711.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS APPEAL

Article VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

10 U.S.C. § 8911

> The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve commissioned officer of the Air Force who has at least 20 years of service computed under section 8926 of this

title, at least 10 years of which have been active service as a commissioned officer. Aug. 10, 1956, c. 1041, 70A Stat. 549.

10 U.S.C. § 8929

A member of the Air Force retired under this chapter is entitled to retired pay computed under chapter 871 of this title. Aug. 10, 1956, c. 1041, 70A Stat. 554.

10 U.S.C. § 1408

(a) In this section:

* * * *

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which —

* * * *

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

* * * *

The full text of 10 U.S.C. § 1408 is in the Appendix (A-29).

Texas Family Code, § 5.01

(a) A spouse's separate property consists of:

(1) the property owned or claimed by the spouse before marriage;

(2) the property acquired by the spouse during marriage by gift, devise, or descent; and

(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Texas Family Code, § 5.02

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.

Texas Property Code, § 23.001

A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure.

STATEMENT OF THE CASE

Appellant, Jack F. Trahan, joined the Army Air Corp on July 3, 1941 as an enlisted man. While on active duty on September 4, 1943 he married Appellee, Emma J. Trahan. On September 10, 1949, Appellant was placed on inactive reserve but was recalled to active duty June 9, 1953. He decided to stay on active duty and avail himself of military retirement benefits.

While still on active duty and before his right to any retirement benefit had vested Appellant and Appellee were divorced on January 22, 1963. This judgment divides the community property and recites, "and the court finding that all the community property of parties is covered thereby" (A-48), a correct statement of the governing law as later made clear by *McCarty* v. *McCarty,* 453 U.S. 210 (1981). Upon becoming eligible for his retirement benefits, Appellant retired from the Air Force on April 30, 1965 with the rank of Major and began receiving his retirement benefits. Appellant and Appellee were briefly remarried from October 28, 1970 until May 7, 1971 but it has never been contended or held that the second marriage and divorce of the parties was of any import to the matters at issue.

In 1977, through a conversation with another lady, Appellee became aware she might be entitled to a portion of Appellant's retirement benefits because of recent holdings by the Texas Courts. (*Clearley* v. *Clearley,* 544 S.W.2d 661 (Tex. 1976) was the case establishing that under state law non-disability unvested retirement benefits were community property subject to division upon divorce.) On February 14, 1977, Appellee filed suit to partition Major Trahan's retirement benefits. Under Texas law all community assets not partitioned at the time of divorce are deemed to be held in co-tenancy and subject to partition. Following *Clearley* this principle was quickly applied to military retirement benefits in *Taggart* v. *Taggart,* 552 S.W.2d 422 (Tex. 1977). Contrary federal law and possible pre-emption issues were not overlooked by all Texas lawyers. *See,* Sage, Military Retired Pay for Texas: A New Outlook, 7 St. Mary's L.J. 28 (1975).

Federal pre-emption under the statutes creating the military retirement program was expressly raised in the answer to Appellee's first suit and was urged to the trial court. The trial court followed the state law expressed in *Clearley* and *Taggart*

and entered a judgment partitioning to Appellee 38.96% of Appellant's retirement benefits and awarding her a money judgment of $47,504.22 for what the trial court found to be Appellee's share of the retirement received and spent by Appellant from date of his retirement to date of the trial court judgment in the first action, plus interest. Appellee was also granted judgment that $275.00 per month of Appellant's share of the retirement be paid to Appellee until such time as the monetary judgment was paid, thereby making Appellant the recipient of less than 50% of his retirement benefits. This judgment was affirmed by the intermediate Texas Court except that it modified the judgment to eliminate the $275 per month deduction from Appellant's share of the retirement benefits. *Trahan* v. *Trahan,* 609 S.W.2d 820 (Tex.Civ.App. 1980, error granted). The federal issues and this Court's holding in *Hisquierdo* v. *Hisquierdo,* 493 U.S. 527, 59 L.Ed. 2d 1, 99 S.Ct. 802 (1979) were urged extensively but unsuccessfully in the intermediate court. Application was made to the Supreme Court of Texas for review and while the case was pending in that court this Court decided *McCarty* v. *McCarty,* 453 U.S. 210 (1981). The Texas Supreme Court granted review and on November 18, 1981 reversed and rendered judgment that Appellee "take nothing." *Trahan* v. *Trahan,* 626 S.W.2d 485 (Tex. 1981) (A-25).

On September 8, 1982, Congress passed the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408. By its terms it became effective February 1, 1983, but it contains provisions which make it retroactive in part to June 25, 1981.

On February 10, 1983, Appellee filed her second partition action in substantially the same language as her first. Appellant answered raising the defenses that (a) the final judgment in the first suit was res judicata, (b) that this case involving a 1963 divorce was still controlled by *McCarty* and the principles therein explained, which showed that there was no community

property interest in 1963 upon which a partition could be based and that federal law was pre-emptive. (c) On motion for new trial and at all times thereafter it was also urged that 10 U.S.C. § 1408 was not applicable to this case and granted Appellee nothing, and (d) that a judgment taking from Appellant part of his retirement benefits would be a taking of property without compensation and a taking without due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. The pertinent points of error presented to the Texas Court of Appeals and the Supreme Court are in the Appendix (A-50). The trial court entered substantially the same judgment entered in the first partition action except that it cut off the money judgment at the date mentioned in the new statute, June 25, 1981, thus reducing the money judgment against appellant to $13,885.05 plus interest (A-41). The $275 per month deduction from Appellant's share was again imposed and Appellee was again awarded 38.96% as her share of community property from the 1963 divorce. On appeal following this judgment a different Court of Appeals affirmed in toto (A-12). Review by the Supreme Court of Texas was denied and Appellant seeks relief here.

The contentions raised by Appellant were disposed of by a holding that res judicata did not apply because of a change in the law, and a holding that "Congress intended that the Act [10 U.S.C. § 1408] nullify the effect of *McCarty;* that is, state courts were to apply state substantive law as if *McCarty* had never existed" (A-4). The contention that there was a taking and a denial of due process under the Fifth and Fourteenth Amendments was not mentioned by the Texas Court of Appeals though it was clear that both that court and the Texas Supreme Court overruled it.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial for five reasons:

A) The decision of the Texas Court of Appeals has so far departed from the accepted and usual course of judicial proceedings on the determination of a federal question as to require correction by this Court.

B) There is conflict between the highest courts of different states of the Union concerning the construction and effect of 10 U.S.C. § 1408.

C) The extent of the retroactive reach of 10 U.S.C. § 1408 is an important question of federal law which has not been, but should be, settled by this Court.

D) The Texas Court of Appeals has decided a federal question in a way that is in conflict with an applicable decision of this Court.

E) There is a taking of property in violation of the Fifth and Fourteenth Amendments that will be repeated unless this Court corrects the lower court's actions.

A.

The right to military retirement benefits is solely a question of federal law whether viewed as stemming from the statutes as they existed prior to the enactment of 10 U.S.C. § 1408 or whether they be viewed as stemming from 10 U.S.C. § 1408. There has been a significant departure from accepted and usual judicial proceedings in that the Texas Court of Appeals has held that a change in the law can remove the res judicata effect of a prior judgment determining the rights of the parties. The holding of the Texas Court of Appeals has been severely and correctly criticized:

"In Trahan v. Trahan, [the Texas Court of Appeals opin-

ion in the present case], the court ruled that '[t]he judgment in [the prior] case was res adjudicata only of the issue then presented of (sic) the facts as they then appeared *and of the legislation then existing*.' *Id.* (brackets and emphasis in the original) (quoting State v. Powell, 134 S.W. 746, 748 (Tex. Civ.App. 1910, writ ref'd) (quoting Utter v. Franklin, 172 U.S. 416, 424 (1899), and citing United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)). Finding that enactment of the USFSPA prevented application of res judicata, the court partitioned the service member's military retirement benefits from June 25, 1981. In doing so, it ignored the Texas Supreme Court's previous holding that Mr. Trahan's retirement benefits were not subject to partition. Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981) (holding that, because of *McCarty* and the supremacy clause, military retirement benefits could not be divided or partitioned).

"The court of appeals decision in *Trahan* is contrary to established principles of claim preclusion. A subsequent change in legislation does not prevent the application of claim preclusion to a final judgment. *See* System Fed'n No. 91, Ry. Employes' Dep't v. Wright, 364 U.S. 642, 646-47 (1961); McGrath v. Potash, 199 F.2d 166, 167 (D.C. Cir. 1952). An examination of the cases cited by the *Trahan* court reveals the inapplicability of the quoted proposition to the *McCarty*-era context. In *Powell, Utter,* and *Sioux Nation,* subsequent legislation effectively waived the protection afforded by claim preclusion to the government in a prior favorable judgement. In *Sioux Nation,* the Supreme Court explicitly recognized the right of Congress to waive the affirmative defense of claim preclusion on the basis of Congress' broad constitutional power to define and "to pay the Debts . . . of the United States." 448 U.S. at 397 (quoting U.S. CONST. art. I, § 8, cl. 1). But while the claim preclusion defense may be waived by the legislature on behalf of the

government, the legislature clearly has not power to deprive a private litigant of that defense. *Cf.* Hodges v. Snyder, 261 U.S. 600, 603 (1923) (stating that "[i]t is true that . . . the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation"); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1855) (stating that "the act of congress cannot have the effect and operation to annul the judgment of the court . . . especially as it respects adjudication upon the private rights of parties"); Inman v. Railroad Comm'n, 478 S.W.2d 124, 128 (Tex.Civ.App. — Austin 1972, writ ref'd n.r.e.) (distinguishing *Powell* as involving a public right and recognizing that "*private rights* of parties, which have become vested under judgment of a Court, cannot be taken away by subsequent legislation") (emphasis in original). Thus, although the government may waive the defense of claim preclusion on its own behalf, subsequent legislation cannot otherwise affect the application of claim preclusion to a final judgment." McKnight, Closing the McCarty USFSPA Window: A Proposal for Relief from McCarty - Era Final Judgments, 63 Tex.L.Rev. 496, 514, n.110 (1984).

It is urged that the considerations set forth by this Court in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981) should be controlling:

> "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interest beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." Heiser v. Woodruff, 327 U.S. 726, 733, 90 L.Ed. 970, 66 S.Ct. 853 (1946).

452 U.S. at 401. The Texas Court of Appeals simply held (A-10):

> The doctrine of res judicata should not apply in this case. Applying the doctrine of res judicata would subvert the intent of Congress and the plain meaning of the Act which is to restore state law to what it was prior to the McCarty decision.

Going further, this Court said in Federated Department Stores:

> We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . .

452 U.S. at 401.

> It is enough for our decision here that Brown I is res judicata as to respondent's federal law claims.

452 U.S. at 402. The failure of the Texas Court of Appeals to apply the doctrine of res judicata based on the prior judgment of the Texas Supreme Court in this case which applied federal law has so far departed from the accepted and usual course of judicial proceedings as to require correction by this Court.

B.

The highest courts of various states are in conflict concerning the effect and construction of 10 U.S.C. § 1408. The highest court of Kentucky in *Bishir and Britt* v. *Bishir,* 84-SC-809-DG, slip opinion October 31, 1985, citing *Russell* v. *Russell,* 604 S.W.2d 33 (Ky.App. 1980) and the highest court of South Dakota, in, *Moller* v. *Moller,* 356 N.W.2d 909 (S.D. 1984) have both refused to reopen divorce judgments final before the McCarty decision. Courts of other states, notably Texas,

California, and New Mexico, have taken the view that 10 U.S.C. § 1408 completely nullifies the McCarty decision and are reopening divorce judgments which had become final prior to the time of that decision. Texas, as will be discussed below, is doing it by the device of partition actions, as used in this present case. There are other cases going both ways that would be a fit subject for briefs on the merits.

In *Walentowski* v. *Walentowski,* 672 P.2d 657 (N.M. 1983), the New Mexico Supreme Court states: "The legislative intent was to abrogate all applications of the McCarty decision and place the courts in a pre-McCarty position." This is also the view in Texas where the Texas Supreme Court has three times said what they have most recently said on December 4, 1985 in the opinion of *Allison* v. *Allison* (A-27):

> The USFSPA makes *McCarty* nugatory with respect to its application to judgments rendered after the date of that decision. *Segrest* v. *Segrest,* 649 S.W.2d 610, 613 n.2 (Tex. 1983); *Cameron* v. *Cameron* 641 S.W.2d 210, 212-13 (Tex. 1982).

As applicable to the present case and indicative of what Texas is doing, the Texas Supreme Court goes on to say in Allison (A-27):

> Accordingly, the rules of law applicable to the partition of military retirement benefits which controlled prior to the rendition of the *McCarty* decision control the disposition of partition suits brought after the effective date of the USFSPA.

In other words, the partition device permits an end run around the Supremacy Clause and the expressed congressional intent that the courts not reopen divorces final prior to the *McCarty* decision:

> In additions [sic], the conferees intend this provision to preclude recognition of changes to court orders finalized before the McCarty decision if those changes are effected after the McCarty decision and as a direct result of the enactment of the new title X of this conference report. In other words, the courts should not favorably consider applications based on the enactment of this title to reopen cases finalized before the McCarty decision wherein military retired pay was not divided.

H. Conf. Rep. 749, 97 Cong., 2nd Sess. 168, reprinted in 1982 U.S. Code Cong. & Ad. News 1569, 1573. In Texas this "end run" around the Supremacy Clause is particularly effective because there is no statute of limitations on partition actions. *Hanrick* v. *Gurley,* 54 S.W. 347, 355 (Tex. 1899); *Hipp* v. *Fall,* 213 S.W.2d 732 (Tex.Civ.App. 1948, error ref., n.r.e.).

The Texas Court of Appeals goes around this intent of Congress by saying that there was no final judgment being reopened because the prior partition suit was not finalized until after McCarty. It deals with the Act's definition of "court order" by simply saying (A-7):

> Finally, although the House and Senate reports speak to divorce decrees rather than partition suits, the Act should be applied in the present case because there would be no cause of action to partition appellant's retirement benefits but for the divorce.

California is also going back into pre-McCarty divorces. The California cases are summarized in the very interesting case of *Aloy* v. *Mash,* 696 P.2d 656 (Cal. 1985), a malpractice action brought against an attorney who properly advised his client in 1971 that she was precluded from receiving a share of

her husband's military retirement benefits by the Supremacy Clause of the United States Constitution. The California Supreme Court says, 696 P.2d at 660:

> Defendant's first argument assumes, of course, that *McCarty* v. *McCarty* once and for all settled the question of Col. McCarty's pension in his favor. Solely because we know judicially that the *McCarty* controversy is far from over and do not wish to make any unnecessary statement that might affect its outcome, we shall assume Defendant's hypothesis to be true.

The California court then says in a footnote on the same page:

> We know nothing about the details of the continuing *McCarty* litigation. It seems a fair guess, however, that it is somehow affected by the passage of the Federal Uniformed Services Former Spouse's Protection Act of 1982. . . .

It seems a fair guess also that the California court will simply ignore the prior decision of this Court in light of its observation at 696 P.2d 661-662:

> The result is that for most purposes, *McCarty* not only is not the law, but never really was.

The Aloy case is a four to three en bank decision of the California Supreme Court wherein the dissent begins with the comment, 696 P.2d 662:

> With the exception of the majority opinion, I know of no case which suggest that an attorney whose advice is correct may be held liable for malpractice.

Appellant most respectfully urges that this Court needs to define the relationship between 10 U.S.C. § 1408 and this Court's decision in *McCarty* v. *McCarty*.

C.

The extent of the retroactive effect of 10 U.S.C. § 1408 is an important question of federal law which has not been, but should be, settled by this Court. It seems that Congress did not intend the Act to have retroactive effect past the date of the decision of this Court in the *McCarty* case. But it is very clear that the courts of Texas, California, and other community property states are construing the Act as a complete legislative overruling of this Court's decision in *McCarty* and are treating their law as though *McCarty* never happened. Texas is certainly going into divorces final prior to *McCarty*, as in this case, and in *Powell* v. *Powell* (A-51), an unreported case by another Texas Court of Appeals in which the Texas Supreme Court denied rehearing on petition for review on December 4, 1985. There are known to this writer three other cases in the trial courts in Texas which involve the same issue.

It is of course the Appellant's position that Congress did not intend 10 U.S.C. § 1408 to permit a retroactive holding by the Texas courts that there was a community interest in military retirement rights at the time of the 1963 divorce of Appellant and Appellee. But if that is what the Act does, Appellant urges the Court that there is not sufficient rational legislative purpose to support retroactive effect on events 20 years ago. Conceding that the spouses of service members needed some help, it does not follow that retroactive application over a period of 20 years will accord with the standards of due process discussed by this Court in, *Pension Benefit Guaranty Corp.* v. *Gray & Co.*, 467 U.S. _____, 81 L.Ed.2d 601, 104 S.Ct. 2709 (1984) and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). The legislative history of 10 U.S.C. § 1408 gives us no indication of why it would be rational or justifiable to reach back 20 years and take from a former service member retirement benefits upon which he has structured his life since

retirement; nor is there any discussion of why there is a need to grant such benefits taken from the retired military person to a former spouse who has adjusted her own life and has been living it for the past 20 years. Such a construction of the Act is a denial of due process and is erroneous. Appellant most respectfully points out that 10 U.S.C. § 1408(c)(1) reads:

> (c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

This enabling provision speaks not only in terms of June 25, 1981, it speaks in terms of "the member and his spouse" and does not say the member and his former spouse, nor the member and his spouse or former spouse. Congress seems to have carefully enabled the states to act only where there was a spouse (as opposed to a former spouse) on June 25, 1981 or thereafter. This limitation seems also born out by the definition in 10 U.S.C. § 1408(a)(6) which reads:

> (6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

"Court order" is defined by the statute as follows:

> (2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered,

ratified, or approved property settlement incident to such previously issued decree), which —

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for —

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b));

(ii) payment of alimony (as defined in Section 462(c) of the Social Security Act (42 U.S.C. 662(c)); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

There is no "court order" as defined by the Act in this present case. Judgments in a partition action are not included in the definition, and the 1963 divorce judgment makes no division of property "and," "specifically provides for the payment of an amount expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member."

If in fact, the intent of Congress in enacting 10 U.S.C. § 1408 was to destroy rights previously vested by final judgments of this Court, and the Supreme Court of Texas applying the law as set forth by this Court, Appellant most respectfully urges that this is arbitrary and irrational legislation and denial of due process under the standards of *Pension Benefit Guar-*

anty Corp v. *Gray & Co., supra,* and, *Usery* v. *Turner Elkhorn Mining Co., supra.*

Appellant most respectfully prays that in light of the result reached by the Texas Court of Appeals in this case and the results being reached in Texas and other states concerning the retroactive application of 10 U.S.C. § 1408, this Court should decide this important question of federal law.

D.

The Texas Court of Appeals has decided a federal question contrary to an applicable decision of this Court, *McCarty* v. *McCarty*, 453 U.S. 210 (1981). The McCarty case has defined what the effect of the federal statutes was prior to the enactment of 10 U.S.C. § 1408. Under those federal statutes, there was no Texas community property interest in Appellant's retirement benefits at the time of his 1963 divorce from Appellee. *McCarty* is still the controlling law concerning the state of military retirement benefits and the pre-emptive nature of the federal statutory scheme in 1963 and at all times thereafter until 1981. Failure of the Texas Court of Appeals to recognize this has caused that court to decide this case in conflict with this Court's holding in *McCarty* and to deny this Appellant his rights under federal law.

E.

Under the authority set forth under "A" above, it seems clear that Appellant had vested Rights which are being taken by the decision of the Texas courts. Appellant served his full time to achieve his military retirement benefits on reliance that the benefits were solely his. Congress should not be permitted to retroactively change the contract. *See, U.S.* v. *Larionoff*, 431 U.S. 864 (1977). While the reenlistment bonuses involved in *Larionoff* were the subject of more specific agreements, the

principle seems applicable. Also, as the authorities listed under argument "A" above show, the former judgment in Appellant's favor created vested rights in Appellant which cannot be taken by legislative act without compensation and due process of law. The 1981 judgment by the Texas Supreme Court applying federal law that Appellee take nothing vested in Appellant the entitlement to all of his retirement benefits. The present judgments of the Texas courts take a substantial part of Appellant's entitlement and take property without compensation and without due process in violation of the Fifth and Fourteenth Amendments of the Constitution. The same thing has happened to others. *Cf. Powell* v. *Powell, supra,* (A-51).

CONCLUSION

Appellant most respectfully prays this Court to note probable jurisdiction and set this case for plenary consideration with briefs on the merits and oral argument. Alternatively, in the event the Court should consider that this case does not properly come within the Court's appellate jurisdiction, Appellant prays that this jurisdictional statement be considered as an application for certiorari and that certiorari be granted.

Respectfully submitted,

SAMUEL DOWNING McDANIEL
1800 MBank Tower
Austin, Texas 78701
512/476-4600

Attorney for Appellant

APPENDIX

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 14,145

JACK F. TRAHAN,

APPELLANT

vs.

EMMA J. TRAHAN,

APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
200TH JUDICIAL DISTRICT
NO. 344,539,
HONORABLE CHARLES D. MATHEWS, JUDGE

This is a partition suit in which Jack F. Trahan appeals from the district court's judgment awarding his former spouse, Emma J. Trahan, 38.96% of his Air Force non-disability retirement benefits. By cross-point, appellee claims the trial court erred in awarding to her these retirement benefits only from June 25, 1981 rather than from April 30, 1965, the date appellant retired.

PROCEDURAL HISTORY

- I -

The Trahans were married on September 4, 1943 and were divorced on January 22, 1963. During this time appellant was a member of the Air Force. (It is stipulated that the Trahans

were married 187 months of the 240 months appellant was in the Air Force.) The divorce decree, however, did not award appellee any share of appellant's retirement benefits. Appellant retired from the Air Force on April 30, 1965 and began receiving retirement benefits at that time. The Trahans remarried on October 28, 1970 but were divorced on May 7, 1971. Again, the second divorce decree did not award appellee any interest in appellant's retirement benefits. Both divorce decrees were silent on this matter.

Appellee brought a suit for partition of appellant's retirement benefits and a judgment in her favor was entered on January 19, 1979 awarding her 38.96% of appellant's retirement benefits paid to him since April 30, 1965 and a like percentage of all future non-disability retirement benefits. This judgment was affirmed by the Court of Civil Appeals. *See* Trahan v. Trahan, 609 S.W.2d 820 (Tex. Civ. App. 1980). Writ of error was granted by the Supreme Court of Texas and during the pendency of that appeal the United States Supreme Court announced its decision in McCarty v. McCarty, 453 U.S. 210 (1981). The Court held in *McCarty* that non-disability retirement pay may not be divided pursuant to state community property laws. The Supreme Court of Texas, citing *McCarty* and the Supremacy Clause of the United States Constitution, reversed and rendered judgment that Emma J. Trahan take nothing. *See* Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981).

- II -

This present suit was filed by Emma Trahan on February 10, 1983 again seeking to partition appellant's retirement benefits in light of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. § 1408 (West 1983). The district court ordered a partition of appellant's retirement benefits from June 25, 1981, awarding appellee 38.96% of said benefits.

Appellant brings five points of error, the thrust of these points being that the decision of the Supreme Court of Texas in Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981) is *res judicata* as to appellee's present cause filed on February 10, 1983, irrespective of the Uniformed Services Former Spouses Protection Act, 10 U.S.C.A. § 1408 (West 1983). Appellant also claims the court order constitutes an illegal garnishment of his wages.

McCARTY

The United States Supreme Court held in McCarty v. McCarty, 453 U.S. 210 (1981) that non-disability retirement pay may not be divided upon divorce pursuant to state community property laws. Richard McCarty served in the Army for twenty years and during all but two of these years he was married to Patricia McCarty. A California superior court awarded Patricia approximately 45% of her husband's retirement pay. That judgment was affirmed by the California Court of Appeals and writ of certiorari was granted by the United States Supreme Court to decide the question of whether or not "the federal scheme of military retirement benefits preempts all state community property laws with respect thereto, and that . . . [state] courts are accordingly precluded by the Supremacy Clause from dividing such benefits. . . ." *McCarty, supra* at 219 n. 12. The Supreme Court, citing Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), held that "the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests." *McCarty, supra* at 232. Questions were then raised such as whether or not McCarty would be applied retroactively and whether courts in community property states would now be able to effect a just distribution of the marital estate upon divorce. *See. e.g.*, Raggio & Raggio, *McCarty v. McCarty: The Moving Target of Federal Pre-Emption Threatening All Non-Employee Spouses,* 13 St. Mary's L.J. 505 (1982); Note, *McCarty v. McCarty: The Battle Over Military Nondisability*

Retirement Benefits, 34 Baylor L. Rev. 335 (1982); Note, *Military Retirement Pay Not Subject To Division As Community Property Upon Divorce: McCarty v. McCarty,* 19 Hous. L. Rev. 591 (1982).

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

In response to the Supreme Court's decision in McCarty v. McCarty, Congress passed the Uniformed Services Former Spouses' Protection Act (the Act), codified at 10 U.S.C.A. § 1408 (West 1983). The section of that act relevant to this appeal provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Id. at (c)(1). "The purpose of [this] act [is] to reverse the effect of the *McCarty* decision." Cameron v. Cameron, 641 S.W.2d 210, 212 (Tex. 1982). *See also* Newton & Trail, *Uninformed [sic] Services Former Spouses' Protection Act - A Legislative Answer To The* McCarty *Problem,* 46 Tex. B. J. 291, 294-96 (1983).

It is clear that Congress had two goals in mind by passing the Act: reverse the effect of the *McCarty* decision *and* provide direct enforcement powers to former spouses seeking payment of retirement benefits previously awarded to them. A reading of the legislative history of the Act shows that Congress intended that the Act nullify the effect of *McCarty*; that is, state courts were to apply state substantive law as if *McCarty* had never existed. The *direct enforcement powers,* however, were to be

applied prospectively from February 1, 1983, the effective date of the Act. The following language from Senate Report No. 502 is helpful in this regard:

> The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what it was when the courts were permitted to apply State divorce laws to military retired pay. Former spouses divorced in the interim period between the *McCarty* decision and the effective date of this law will have the opportunity to return to court to have their decrees modified in light of this legislation. However, nothing in the bill would mandate payments out of retired pay which had been disbursed during the period between the date of the *McCarty* decision and the effective date of this legislation. The mechanism for direct payment of court orders for alimony, child support and property distribution would apply only to payments of retired pay for periods beginning on or after the effective date of this legislation.

S. Rep. No. 502, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1599-1600.

This report also provides a section-by-section analysis of 10 U.S.C.A. 1408 (West 1983). The analysis of subsection (c) is as follows:

> Subsection (c) of section 1408 sets forth several conditions and limitations applicable to court orders served and payments made pursuant to section 1408. Paragraph (1) of subsection (c) provides that, subject to the other limitations of section 1408, a court, as

> defined by paragraph (1) of subsection 1408(a), may treat the disposable retired or retainer pay payable to a member for pay periods beginning on or after June 26, 1981, either as solely the property of the member or as the property of the member and the member's spouse, depending on the law applicable to the court in question. The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. *This retroactive application will at least afford individuals who were divorced or had decrees modified during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.*

Id. at 16, 1982 U.S. Code Cong. & Ad. News 1611 (emphasis added).

Appellant cites us to the House Conference Report which addresses, *inter alia,* the retroactivity of the Act and its application to divorce decrees finalized prior to the *McCarty* decision.

> In additions [sic], the conferees intend this provi-

> sion to preclude recognition of changes to court orders finalized before the *McCarty* decision if those changes are effected after the *McCarty* decision and as a direct result of the enactment of the new title X of this conference report. In other words, the courts should not favorably consider applications based on the enactment of this title to reopen cases *finalized before* the *McCarty* decision wherein military retired pay was not divided.

H. Conf. Rep. 749, 97th Cong., 2d Sess. 168, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1569, 1573. Appellant claims this language indicates that Congress did not intend for former spouses to reopen cases to effect some kind of division of retirement benefits pursuant to the Act. Appellant is misapplying this language to his case as his case was not finalized before the *McCarty* decision, thereby taking it out of the category of cases contemplated by the House in its conference report. The Supreme Court of Texas states: "No final adjudication regarding Jack Trahan's military retirement benefits, therefore, has or will be made until this Court renders its opinion." Trahan v. Trahan, 626 S.W.2d 485, 488 (Tex. 1981). This opinion was handed down five months after the United States Supreme Court announced its decision in *McCarty*. Finally, although the House and Senate reports speak to divorce decrees rather than partition suits, the Act should be applied in the present case because there would be no cause of action to partition appellant's retirement benefits but for the divorce.

TEXAS LAW

Military retirement benefits as early as 1960 were considered community property subject to division upon divorce by Texas courts. Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App. 1960, no writ); Busby v. Busby, 457 S.W.2d 551 (Tex.

1970); Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977); Clearley v. Clearley, 544 S.W.2d 661 (Tex. 1976). The Supreme Court of Texas has also held that *McCarty* is to apply only prospectively, that is, any judgment dividing military retirement pay which became final prior to the date *McCarty* was announced (June 26, 1981) would stand. Segrest v. Segrest, 649 S.W.2d 610 (Tex. 1983). It is equally clear that any judgment of divorce or partition entered after February 1, 1983, the effective date of the Act, awarding a spouse an interest in retirement benefits would also stand. The problem in this case involves a former spouse who had the misfortune of having a final judgment entered after June 26, 1981, the date *McCarty* was handed down, and before February 1, 1983, the effective date of the Act. This "gap problem" was addressed by the California Court of Appeals in In Re Marriage of Hopkins, 191 Cal. Rptr. 70 (Cal. Ct. App. 1983).

> Not to apply the Act retroactive to June 25, 1981, would yield far more problems than would any mechanical application of a calendar-determining set of laws. To allow cases decided, but not yet final, either before or during the relatively short interval of *McCarty* to be subject to the *McCarty* rule would carve out of the many persons entitled to military Pensions a fortunate or unfortunate few who had substantial rights determined by the vagaries of the calendar. It would create a gap of some 20 months in which their future entitlements were or were not to be determined in a manner different from the 40 years before or the indefinite future after. Most importantly, it would allow the happenstance of the calendar to thwart the meaning of Congress when the Congress did quickly and affirmatively act to clearly and fully make these pension rights subject to the state's control. Indeed, not to apply the

> Act retroactively would be to thwart the very title of the Act, the "Uniformed Services Former Spouses' Protection Act."

Id. at 77.

We also find the following excerpt from Smith v. Smith, 458 A.2d 711 (Del. Pam. Ct. 1983) persuasive:

> It appears rather clear that Congress, in passing the Act, intended to obliterate the adverse effect of McCarty upon the divorced spouse of military personnel by making it retroactive to the date of that decision. The Committee Report which accompanied the bill (copy attached) states at p. 1:
>
> > "The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty* v. *McCarty,* 458 [453] U.S. 210 [101 S.Ct. 2728, 69 L.Ed.2d 589] (1981). The bill would accomplish their objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation."
>
> And Congress clearly felt that spouses aggrieved as a result of *McCarty* should have a chance to rectify the situation when the Report stated at p. 5:
>
> > "Former spouses divorced in the interim period between the *McCarty* decision and the effective date of this law *will have the opportunity to return to court to have their decrees modified in light of this legislation."* (Emphasis added)
>
> When Report used the words "divorced in the interim period", I think it clear that the author had in mind a

property decree which formed a part of the divorce decree itself and did not intend to turn away a spouse whose divorce occurred prior to *McCarty* but whose property decree came afterward. In short, I believe the Report intended to refer to the date of the decree disposing of property and not necessarily the divorce decree only. The statute itself does not refer to a "divorce" decree but only to "court order" which is defined by the Act itself in § 1408(a)(2) to include a "final decree of divorce, dissolution, annulment or legal separation issued by a court, *or a court* ordered, ratified or approved property *settlement incident to such a decree* . . . ." (Emphasis added)

Obviously, even though Congress clearly seemed to leave the door open for modification of *post-McCarty* property decree, Congress cannot compel state courts to afford that opportunity . . . . indeed they rather clearly stated that courts should have the freedom to undo any harm created by the *McCarty* precedent by removing it retroactively. The Act is really a legislative reversal or vacation of *McCarty* . . . .

Should the Court, therefore, in view of the Act and the congressional intent referred to above reopen the case to consider an amendment to the' Order of November 30, 1981 to include the Husbands military pension as specific property subject to division? It is my considered judgment that it would be inequitable not to reopen.

Id. at 713-14.

The doctrine of *res judicata* should not apply in this case. Applying the doctrine of *res judicata* would subvert the intent of Congress and the plain meaning of the Act which is to restore state law to what it was prior to the *McCarty* decision.

"The judgment in [the prior] case was res adjudicata only of the issue then presented of the facts as they then appeared *and of the legislation then existing.*" State v. Powell, 134 S.W. 746, 748 (Tex. Civ. App. 1910, writ ref'd), quoting Utter v. Franklin, 172 U.S. 416 (1899) (emphasis added). *See also* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). Given the subsequent legislation passed by Congress since *McCarty* was handed down, we hold that *res judicata* does not bar appellee from bringing this action and, accordingly, overrule appellant's points of error.

Appellant also claims that the trial court's judgment is an unconstitutional garnishment of his wages. We do not agree. "Garnishment is a statutory proceeding whereby the property, money, or credits of one person in the possession of, or owing by another are applied to the payment of the debt of a debtor by means of proper statutory process issued against the debtor and the garnishee." Beggs v. Fite, 106 S.W.2d 1039, 1042 (Tex. 1937). The judgment in the present case involves no third party. It merely directs appellant to pay a certain percentage of his retirement benefits to appellee.

We will overrule appellee's cross-point of error seeking division of appellant's retirement benefits from April 30. 1965. The judgment of the trial court awarding appellee 38.96% of appellant's military retirement benefits from June 25, 1981, is affirmed.

/s/
Jim Brady, Justice

[Before Chief Justice Phillips, Justices Powers and Brady]Affirmed
Filed: October 24, 1984

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

JUDGMENT RENDERED OCTOBER 24, 1984

14,145 — JACK F. TRAHAN V. EMMA J. TRAHAN
APPEAL FROM 200TH DISTRICT COURT OF TRAVIS COUNTY Before Chief Justice Phillips, Justices Powers and Brady AFFIRMED — Opinion by Justice Brady

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that appellant, Jack F. Trahan, as principal, and Merchant's Mutual Bonding Company, as surety on the appeal bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

CLERK'S OFFICE — COURT OF APPEALS
Third Supreme Judicial District
P.O. Box 12547 — Capitol Station
Austin, Texas 78711

December 19, 1984

RE: No. 14,145 — Jack F. Trahan v. Emma J. Trahan

Dear Sir:

You are hereby notified that appellant's and appellee's motions for rehearing were this day submitted and overruled.

Very truly yours,

MRS. MARGIE LOVE, CLERK

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 12, 1985

Mr. Samuel D. McDaniel
P.O. Box 638
Austin, Texas 78767

Mr. Phillip C. Friday, Jr.
700 San Antonio
Austin, Texas 78701

RE: Case No. C-3787

STYLE: JACK F. TRAHAN
v. EMMA J. TRAHAN

Dear Counsel:

Both applications for writ of error in the above referenced case were this day refused with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 18, 1985

Mr. Samuel D. McDaniel
P. O. Box 638
Austin, Texas 78767

Mr. Phillip C. Friday, Jr.
700 San Antonio
Austin, Texas 78701

RE: Case No. C-3787

STYLE: JACK F. TRAHAN
v. EMMA J. TRAHAN

Dear Counsel:

Today, the Supreme Court of Texas overruled all the motions for rehearing in the above-referenced application/s for writ of error.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/
Deputy

No. C-3787

IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

* * *

FILED
IN SUPREME COURT
OF TEXAS
NOV 27 1985
MARY M. WAKEFIELD, Clerk
By _____ Deputy

JACK F. TRAHAN,

Petitioner,

V.

EMMA J. TRAHAN,

Respondent

* * *

No. 14,145

IN THE COURT OF APPEALS THIRD SUPREME
JUDICIAL DISTRICT
AUSTIN, TEXAS

* * *

JACK F. TRAHAN,

Appellant,

V.

EMMA J. TRAHAN,

Appellee

* * *

NOTICE OF APPEAL

Notice is hereby given that Jack F. Trahan, Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment and orders of the Court of Appeals for the Third Supreme Judicial District sitting in Austin, Texas in said Court's Cause No. 14,145 in which judgment was entered on October 24, 1984 and from the denial of Application For Writ of Error to review said judgment done by the Supreme Court of Texas under it's Cause No. C-3787 on September 18, 1985 which order is the final judgment or decree rendered by the highest court of a state in which a decision could be had. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/

Samuel Downing McDaniel
Attorney for Appellant

PROOF OF SERVICE

I, Phillip C. Friday, attorney for Appellee, Emma J. Trahan, hereby acknowledge that a copy of the above Notice of Appeal was personally served upon Appellee, through me, her attorney or record this 27th day of November, 1985.

By /s/

Phillip C. Friday
Attorney for Appellee

No. C-3787

IN THE

SUPREME COURT OF TEXAS
AUSTIN, TEXAS

* * *

JACK F. TRAHAN,

Petitioner,

V.

EMMA J. TRAHAN,

Respondent



NOV 27 1985

* * *

NO. 14,145

IN THE COURT OF APPEALS
THIRD SUPREME JUDICIAL DISTRICT
AUSTIN, TEXAS

* * *

JACK F. TRAHAN,

Appellant

V.

EMMA J. TRAHAN,

Appellee

* * *

NOTICE OF APPEAL

Notice is hereby given that Jack F. Trahan, Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment and orders of the Court of Appeals for the Third Supreme Judicial District sitting in Austin, Texas in said Court's Cause No. 14,145 in which judgment was entered on October 24, 1984 and from the denial of Application For Writ of Error to review said judgment done by the Supreme Court of Texas under it's Cause No. C-3787 on September 18, 1985 which order is the final judgment or decree rendered by the highest court of a state in which a decision could be had. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully yours,

/s/

Samuel Downing McDaniel
Attorney for Appellant

PROOF OF SERVICE

I, Phillip C. Friday, attorney for Appellee, Emma J. Trahan, hereby acknowledge that a copy of the above Notice of Appeal was personally served upon Appellee, through me, her attorney of record this 27th day of November, 1985.

/s/

Phillip C. Friday
Attorney for Appellee

IN THE SUPREME COURT OF TEXAS

NO. C-106

JACK F. TRAHAN,	*	
	*	
Petitioner	*	
	*	FROM TRAVIS COUNTY
v.	*	
	*	SIXTH DISTRICT
EMMA J. TRAHAN,	*	
	*	
Respondent	*	

Emma Trahan instituted this suit against her former husband, Jack Trahan, for partition of his Air Force retirement benefits, which had not been divided by property settlement in either of two previous divorces. The law in Texas has become well established that military retirement benefits earned during marriage are property subject to division upon divorce. *See, e.g., Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977); Cearley* v. *Cearley,* 544 S.W.2d 661 (Tex. 1976). However, in light of the United States Supreme Court's recent decision in *McCarty* v. *McCarty,* ____ U.S. ____, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), we are compelled to review the present status of Texas law. The sole question presented is whether the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, preempts a division by a Texas state court of a spouse's entitlement to Air Force retirement benefits pursuant to 10 U.S.C. §§ 8911, 8929.[1]

---

[1] Military voluntary non-disability retirement statutes are found in Title 10 of the United States Code. Although the applicable retirement statutes for each branch of the service are found in different sections of Title 10, the operative language of each statute is identical. *See* 10 U.S.C. §§ 3911 et seq. (1976 & Supp. III 1979) (Army); *id.* §§ 6321 et seq. (1976 & Supp. III 1979) (Navy and Marine Corps); *id.* §§ 8911 et seq. (1976) (Air Force).

Jack F. Trahan entered active military service July 3, 1941. He married Emma on September 4, 1943. Jack served in the inactive reserves from September 10, 1949, until being recalled to active duty June 9, 1953. The couple first divorced on January 22, 1963.

On April 30, 1965, Jack retired from the Air Force and began collecting his military retirement pay. The Trahans remarried October 28, 1970, but were again divorced on May 7, 1971. During the time Jack served on active duty for retirement pay purposes, he and Emma were married for fifteen years and seven months. At the time of the first divorce Jack was not eligible for any retirement benefits. Until Emma filed this suit to partition on February 14, 1977, she had never sought or received any interest in the retirement benefits.

The trial court awarded Emma Trahan a portion of her husband's Air Force retirement pay, both accrued and anticipated. After reforming the judgment, the Court of Civil Appeals affirmed the trial court. 609 S.W.2d 820. We reverse the judgment of the Court of Civil Appeals and render judgment that the wife is not entitled to any part of her former husband's military retirement benefits.

The Supreme Court of the United States on June 26, 1981, handed down its decision in *McCarty* v. *McCarty,* ____ U.S. ____, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The Court held that military non-disability retirement benefits are not subject to division upon dissolution of marriage pursuant to state community property laws.

In *McCarty,* the United States Supreme Court reasoned that Congress enacted the military retirement system to provide for retirees and to meet the personnel management needs of the active military forces. Concluding that the application of community property principles to military retirement pay

threatened "grave harm" to clear and substantial federal interests, the Court ruled that under the Supremacy Clause California courts were precluded from dividing military non-disability retirement pay upon divorce.

It is clear that the *McCarty* decision controls the disposition of this case. Article I, Section 1, of the Texas Constitution expressly acknowledges that the State of Texas is subject to the United States Constitution. This Court must recognize and follow the supreme law of the land. *Eichelberger* v. *Eichelberger,* 582 S.W.2d 395 (Tex. 1979); *Emmons* v. *Pacific Indem. Co.,* 146 Tex. 496, 208 S.W.2d 884 (1948); *Guiterrez* v. *El Paso & NE. R.R.,* 102 Tex. 378, 117 S.W. 426 (1909); *McKee* v. *Brooks,* 64 Tex. 255 (1885). In *Eichelberger* we reiterated that this Court is controlled in the construction of federal laws by the decisions of the United States Supreme Court. Although we have held previously that military retirement benefits earned during marriage constitute community property subject to division upon divorce, we can no longer adhere to that rule. Under *McCarty,* the Supremacy Clause of the United States Constitution preempts division of a spouse's entitlement to military non-disability retirement benefits through application of Texas community property laws.

On Suggestion for Rehearing En Banc, the United States Court of Appeals for the Fifth Circuit in *Erspan* v. *Badgett,* No. 79-4011 (5th Cir. October 9, 1981) (en banc per curiam), was faced with a question somewhat similar to that now confronting this Court. In *Erspan,* a divorced wife, Mary Frances Erspan, filed suit in the United States District Court for the Western District of Texas against her former husband, Lloyd J. Badgett, to enforce the terms of a 1963 Texas divorce decree awarding her one-half of her husband's military retirement benefits. In a non-jury trial, Chief Judge William Sessions ren-

dered judgment in favor of the former wife.[2] Badgett appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the District Court's ruling.

Badgett relied expressly upon the *McCarty* decision on Suggestion for Rehearing, arguing that the court should "reverse" the 1963 divorce decree insofar as it awarded Erspan a portion of his military retirement. However, in a per curiam opinion, the Fifth Circuit concluded that it lacked jurisdiction to reverse the 1963 Texas divorce decree. The court noted that unlike *McCarty, supra,* and *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572 (1979), *Erspan* was not a direct appeal from a state divorce decree. In fact, the appeal before the Fifth Circuit did not involve a divorce decree. Citing the United States Supreme Court's recent decision in *Federated Dep't Stores, Inc.* v. *Moitie,* ___ U.S. ___, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), the court stated it could find no reason why the 1963 final judgment should not be given its usual res judicata effect. Further, the court reasoned that "as a final judgment, [the divorce decree] settles not only the issues actually litigated, but also those issues that could have been litigated in the proceeding." *Erspan, supra,* Slip. Op. at 12075 (citing *Federated Department Stores, supra*). The court found further support for its holding in these words from the Supreme Court: "[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested upon a legal principle subsequently overruled in another case." *Erspan, supra,* Slip Op. at 12075 (quoting *Federated Department Stores, supra*). Having found no suggestion in the *McCarty* opinion that the Supreme Court intended that its

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[2] Judge Sessions also permanently enjoined Badgett from proceeding with his civil contempt action against his former wife in Federal District Court in Missouri where he had previously filed bankruptcy proceedings.

decision invalidate, "or otherwise render unenforceable prior valid and subsisting state court judgments," the Fifth Circuit also declined to so do.

Although the case before us involves a partition suit, it does not come within the holding in *Erspan, supra.* Unlike *Erspan,* the military retirement benefits in dispute were not partitioned at the time of either of the Trahans' divorces. No final adjudication regarding Jack Trahan's military retirement benefits, therefore, has or will be made until this Court renders its opinion. In the absence of a final adjudication, the doctrine of res judicata is inapplicable. Thus, the doctrine cannot be applied now to allow Emma Trahan to recover a portion of her former spouse's military retirement benefits pursuant to our previous holding in *Busby* v. *Busby,* 457 S.W.2d 551 (Tex. 1970).

Having determined that Emma Trahan is not entitled to any portion of her husband's military retirement pay we need not consider whether the Court of Civil Appeals erred in reforming the trial court's judgment to delete the order that Jack Trahan apply $275.00 from his share of future monthly retirement payments toward payment of accrued benefits found owed to Emma. The point of error is rendered moot by this opinion and is hereby overruled.

The judgment of the Court of Civil Appeals is reversed and judgment is rendered that Emma Trahan take nothing.

/s/

James G. Denton
Justice

OPINION DELIVERED: November 18, 1981

JUDGMENT
TEXAS SUPREME COURT No. C-106
NOVEMBER 18, 1981
(Note: The above does not appear on the judgment itself as it is attached to the opinion.)

JACK F. TRAHAN	)	
Petitioner	)	
vs.	)	From Travis County, Sixth District
EMMA J. TRAHAN	)	
Respondent	)	

This cause was heard on writ of error to the Court of Civil Appeals for the Sixth Supreme Judicial District. The original transcript and the transcript showing the proceedings in the Court of Civil Appeals were considered.

It is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals which reformed and affirmed the judgment of the trial court that awarded military retirement benefits to the divorced wife, Emma J. Trahan.

It is *ordered:*

1) that the judgment of the Court of Civil Appeals be reversed and judgment is rendered that Emma J. Trahan take nothing by reason of this appeal in accordance with the opinion of this Court.

2) Petitioner, Jack F. Trahan, shall recover from respondent, Emma J. Trahan, all the costs he incurred in this Court, the Court of Civil Appeals and the District Court.

3) Respondent, Emma J. Trahan, shall pay the

costs in this Court, the Court of Civil Appeals and the district Court.

A copy of this judgment with a copy of the opinion shall be certified to the District Court of Travis County, Texas for observance.

(Opinion of the Court by Justice Denton)

IN THE SUPREME COURT OF TEXAS

No. C-4384

ANTONIA CARICATO ALLISON, Petitioner	*	
v.	*	From Tarrant County
WILLIAM R. ALLISON, Respondent	*	Second District

PER CURIAM

This is a partition suit brought by a former spouse of a military serviceman to obtain division of military retirement benefits. The trial court rendered summary judgment for the serviceman, and the court of appeals affirmed that judgment. 690 S.W.2d 340. The parties were divorced in September, 1981. The divorce decree expressly awarded all military retirement benefits to the serviceman.

The parties' divorce decree was rendered after the date of the United States Supreme Court's opinion in *McCarty* v. *McCarty,* 453 U.S. 210 (1981) [June 26, 1981], and before the effective date of the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408 [February 1, 1983]. The USFSPA makes *McCarty* nugatory with respect to its application to judgments rendered after the date of that decision. *Segrest* v. *Segrest,* 649 S.W.2d 610, 613 n.2 (Tex. 1983); *Cameron* v. *Cameron, 641 S.W.2d 210, 212-13 (Tex. 1982).* Accordingly, the rules of law applicable to the partition of military retirement benefits which controlled prior to the rendition of the *McCarty* decision control the disposition of partition suits brought after the effective date of the USFSPA.

Partition is available as a means of dividing property formerly held by spouses as community property which is *not*

divided upon divorce and is later held by the former spouses as tenants in common. *Harrell* v. *Harrell,* 692 S.W.2d 876 (Tex. 1985). However, the disposition of retirement benefits in the express terms of a divorce decree renders those benefits *not* subject to later partition. *Constance* v. *Constance,* 544 S.W.2d 659, 660-61 (Tex. 1976). In the present case, the divorce decree made an express disposition of William Allison's military retirement benefits. The court of appeals' opinion is consistent with our opinion in *Constance* v. *Constance* and, therefore, we refuse petitioner's application for writ of error, no reversible error. Tex.R.Civ.P. 483.

OPINION DELIVERED: December 4, 1985.

10 U.S.C. § 1408

(a) In this section:

(1) "Court" means —

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which —

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for —

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b));

(ii) payment of alimony (as defined in Section 462(c) of the Social Security Act (42 U.S.C. 662(c)); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically

provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this title) less amounts which —

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38; (C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premi-

ums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section —

(1) service of a court order is effective if —

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order —

(A) Is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing of its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, of (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposa-

ble retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin no later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony

or the payment of an amount of disposable retired or retainer pay as a result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) (sic) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) (sic) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall —

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired, or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served

and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of —

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (b) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus —

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as the Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to

section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (b) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 695) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 790. As Amended Pub.L. 98-525, Title VI, 643(a)-(d), Oct. 19, 1984, 98 Stat. 2547, 2548.)

NO. 344,539

EMMA J. TRAHAN	*	IN THE DISTRICT COURT
	*	
V.	*	TRAVIS COUNTY, TEXAS
	*	
JACK F. TRAHAN	*	200TH JUDICIAL DISTRICT

CORRECTED FINAL JUDGMENT

On the 22nd day of August, 1983, there came on for consideration the above styled and numbered cause, wnerein EMMA J. TRAHAN is Plaintiff and JACK F. TRAHAN is Defendant. Both parties appeared in person and by their attorney of record and announced ready for trial. The Court having examined the pleadings and heard the evidence and argument of counsel, finds that it has jurisdiction over this cause and the parties thereto. A jury was waived, and all matters in controversy, including questions of fact and of law, were submitted to the Court. Final Judgment was signed on September 7, 1983.

Subsequently, on October 18, 1983, pursuant to Defendant's Motion to Modify Judgment, the Court determined that the aforesaid Final Judgment should be modified and corrected as follows:

The Court finds that Defendant has received the sum of One Hundred Eighty Nine Thousand Nine Hundred Fifty Dollars and Four Cents ($189,950.04) in gross retirement pay since his retirement from the United States Air Force on April 30, 1965, through the month of August, 1983. The Court further finds that as of date of trial herein, Defendant receives the sum of One Thousand Six Hundred Dollars and Twelve Cents ($1,600.12) in gross retirement pay from the United States Air Force every month; and Defendant receives the sum of One

Thousand Three Hundred Fifty Six Dollars and Sixty Three Cents ($1,356.63) in disposable retired pay from the United States Air Force every month.

The Court concludes that Defendant's entitlement to his Air Force retirement pay was a community asset of the marriage of Plaintiff and Defendant which ended in divorce on January 22, 1963. The Court finds that said asset was not divided in either of the parties' previous divorces, and the Court concludes that Plaintiff is a tenant-in-common with Defendant as to such asset, and further concludes that Plaintiff is entitled to 38.96% of such Air Force retirement pay, both that which has accrued to date, and that which will be paid in the future. The Court further finds that Defendant has paid Plaintiff nothing of her share of the benefits.

The Court concludes that Plaintiff is entitled to recover her community share of Defendant's Air Force disposable retired pay under the Uniformed Services Forcer Spouses' Protection Act, Pub. L. 97-252, from and after June 25, 1981. The Court finds that Defendant received the sum of Thirty Three Thousand Five Hundred Ninety Dollars and Thirty One Cents ($33,590.31) in disposable retired pay, from June 25, 1981, through date of trial herein, of which Plaintiff is entitled to recover her community share amounting to 38.96%. The Court accordingly finds that Plaintiff is entitled to recover the sum of Thirteen Thousand Eighty Six Dollars and Seventy Eight Cents ($13,086.78), plus interest on each installment from the due date thereof through the date of trial herein at the rate of 6% per annum, which amount of interest the Court finds to be Seven Hundred Ninety Eight and Twenty Seven Cents ($798.27).

It is accordingly ORDERED, ADJUDGED and DECREED that Plaintiff, EMMA J. TRAHAN, recover judgment against Defendant JACK F. TRAHAN, in the sum of Thirteen Thou-

sand Eight Hundred Eighty Five Dollars and Five Cents ($13,885.05), together with interest thereon at the statutory rate from date of this Judgment.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff, EMMA J. TRAHAN, do have and recover from Defendant, JACK F. TRAHAN, 38.96% of all future payments of his Air Force disposable retired pay, including any cost-of-living increases which may be conferred under applicable law; together with interest on any amount not paid over to Plaintiff within thirty (30) days of receipt by Defendant, at the statutory rate.

The Court further finds that Defendant is a constructive trustee, for the use and benefit of Plaintiff, with respect to said Air Force disposable retired pay. To effectuate the foregoing Judgment, it is further ORDERED, ADJUDGED and DECREED that Defendant shall instruct the Air Force Accounting and Finance Center, Denver, Colorado, to pay to Plaintiff, at her residence, from Defendant's account, a sum in dollars equal to 38.96% of Defendant's monthly disposable retired pay together with any cost-of-living increases added thereto, commencing on September 30, 1983, and continuing on the last day of each month thereafter so long as Defendant is entitled to receive his disposable retired pay.

It is further ORDERED, ADJUDGED and DECREED that Defendant shall instruct the Air Force Accounting and Finance Center, Denver, Colorado, to pay unto Plaintiff, at her residence, from Defendant's retirement account, the sum of Two Hundred Seventy Five Dollars ($275.00) per month, beginning on the 30th day of September, 1983, and continuing on the last day of each month thereafter until Plaintiff shall have received the sum of Thirteen Thousand Eight Hundred Eighty Five Dollars and Five Cents ($13,885.05), together with interest

thereon as provided above; such payments shall be credited against such judgment, but shall not bar execution on the unpaid balance.

In the event Defendant should fail or refuse to instruct the United States Air Force as required above, or in the event the United States Air Force should fail or refuse to pay Plaintiff as required above, it is further ORDERED, ADJUDGED and DECREED that Defendant shall pay unto Plaintiff a sum in dollars equal to 38.96% of his monthly disposable retired pay, together with any cost-of-living increases added thereto, beginning on September 30, 1983, and continuing on the last day of each month thereafter, so long as Defendant is entitled to receive such pay; and in addition, Defendant shall pay unto Plaintiff the sum of Two Hundred Seventy Five Dollars ($275.00) per month from his monthly disposable retired pay, beginning on September 30, 1983, and continuing on the last day of each month thereafter until Plaintiff shall have received the sum of Thirteen Thousand Eight Hundred Eighty Five Dollars and Five Cents ($13,885.05), together with interest thereon as provided above; such payments shall be credited against such judgment, but shall not bar execution on the unpaid balance. It is further ORDERED, ADJUDGED and DECREED that Defendant shall make such payments into the Registry of this Court, hereby designated as the Domestic Relations Office, Travis County Courthouse, Austin, Texas, who shall thereafter promptly remit such payments to Plaintiff.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff be, and is hereby awarded, 38.96% of any amounts withheld from Defendant's gross retirement pay for Federal Income Tax purposes, beginning on September 30, 1983; and that Defendant shall furnish unto Plaintiff a copy of his W-2 Form or other notice from the Internal Revenue Service show-

ing the amount withheld from his gross retirement pay for Federal Income Tax purposes in the preceeding year, a copy of said Form to be furnished to Plaintiff on or before February 15, 1984, and each year thereafter.

All costs of this proceeding are hereby ADJUDGED in favor of Plaintiff and against Defendant, for which let execution issue if not timely paid.

All other relief requested by Defendant in his Motion to Modify Judgment is hereby DENIED.

SIGNED this 15th day of November, 1983.

/s/
CHARLES D. MATHEWS, JUDGE

I have seen this Judgment:

/s/
SAMUEL D. McDANIEL,
Attorney for Defendant
Jack F. Trahan

No. F-148,007

JACK F. TRAHAN	* IN THE DISTRICT COURT
V.	* 57th JUDICIAL DISTRICT
EMMA JEAN TRAHAN	* BEXAR COUNTY, TEXAS

On this 21st day of January, 1963, came on to be heard the above entitled and numbered cause wherein Jack F. Trahan is plaintiff and Emma Jean Trahan is defendant, and came the parties in person and by their respective attorneys of record, and the plaintiff announced that he did not desire to further prosecute his petition herein, and that defendant announced ready on her cross-action, and it appearing to the court, from an inspection of the records herein and from the evidence that the plaintiff's petition has been on file in this court for sixty (60) full days and that cross-plaintiff is an actual bona fide inhabitant of the State of Texas for a period of more than twelve (12) months nexts (sic) preceeding the filing of plaintiff's petition, and that cross-plaintiff has resided in Bexar County for more than six (6) months next preceeding the filing of this suit, and no jury having been demanded by either of the parties hereto, the court proceeded to try said cause, and thereon, all matters in controversy, as well of fact as of law, were submitted to the court, and the court having considered the pleadings, the evidence and the argument of counsel, and being of the opinion that the facts alleged in cross-plaintiff's petition have been proven by full and satisfactory evidence, and that she is entitled to a divorce from the cross-defendant, it is accordingly ORDERED, ADJUDGED AND DECREED by the court that the bonds of matrimony heretofore and now existing between the cross-plaintiff, Emma Jean Trahan, and the cross-defendant, Jack F. Trahan, be and the same are hereby dissolved, and that the cross-plaintiff is hereby divorced from the cross-defendant,

and that all relief prayed for in plaintiff's petition herein is in all things denied.

It further appearing to the court that one child was born of said marriage, viz: Jeannie Jacqulyn, a girl, age 16 years, and that cross-plaintiff, Emma Jean Trahan, is a fit and proper person to have the care, custody and control of said minor, it is accordingly ORDERED, ADJUDGED AND DECREED by the court that the care, custody and control of Jeannie Jacqulyn Trahan, minor daughter of the parties, be and the same is hereby awarded to the cross-plaintiff, Emma Jean Trahan, and that the cross-defendant, Jack F. Trahan, shall contribute to the cross-plaintiff, Emma J. Trahan, the sum of $125.00 on the first day of February, 1963, and a like and similar sum on the first day of each and every ensuing month, for the education, maintenance and support of said minor, until the further order of this court, or until said child attains the age of 18 years.

It further appearing to the court that the parties own as community property, the following described real and personal property, to-wit: Lot 29, Block 6, New City Block 8180, DONALDSON TERRACES, within the corporate limits of the City of San Antonio, Bexar County, Texas, known as 203 Bexar Drive; cash value in a Metropolitan Life Insurance Company life policy on the life of Jack F. Trahan, being policy no. 22489139 in the sum of $140.00; a gun collection, fishing equipment and personal effects, value of $600.00; cash in the name of Jack F. Trahan in the Guaranty State Bank of New Braunfels, $500.00; cash deposited in USAF Security Service Credit Union in the name of Jack F. Trahan, $2,649.00; present value of U. S. Savings Bonds in the name of Jack F. Trahan, $568.00; equity in a 1963 Chrysler "300" in the name of Jack F. TRahan, $0.00; 297.002 shares of TV Electronics Fund in the name of the parties, $2,153.00; 144.39 shares of Hamilton Fund in the name of the parties, $713.00; 2160.80 shares in Investors Interconti-

nental Fund in the name of the parties, $1,247.00; 86.441 shares of Investors Stock Fund in the name of the parties, $1,004.00; cash deposited in the name of Jack F. Trahan in First Federal Savings & Loan Association of San Antonio $471.00; cash deposited in U.S.A.F. Security Service Credit Union in the name of Jeannie Jacqulyn Trahan, $3,276.00; cash deposited in U.S.A.F. Security Service Center Union in the name of Emma Jean Trahan, $3,979.00; furniture and personal effects in Mrs. Trahan's possession, $500.00; cash in the name of Emma Jean Trahan in Lamesa National Bank, $255.00; value of a 1962 Chevrolet Corvair, $1500.00; cash value of a juvenile endowment policy on Jeannie Jacqulyn Trahan, being Amicable Life Insurance Company policy no. 245790, $1,710.00.

It is further appearing to the court that the parties have entered into a property settlement agreement whereby it was agreed that the cross-plaintiff was to receive one-half of the cash surrender value of the Metropolitan Life policy on the life of Capt. Trahan, or the sum of $220.00, and that the cross-defendant was to receive said policy and all right, title and interest therein, and cross-plaintiff to be divested of any further right, title or interest therein, that each of the parties were to receive one-half of the sum of $500.00 on deposit in the Guaranty State Bank of New Braunfels; that each of the parties was to receive one-half of the $2,649.00 deposited in the name of the cross-defendant in U.S.A.F. Security Service Credit Union; that each party was to receive one-half of the U.S. Savings Bonds in the name of cross-defendant; that the cross-plaintiff was to receive by special warranty deed from the cross-defendant the above described house at 203 Bexar Drive, together with all household furnishings belonging to the parties and all the personal effects of the cross-plaintiff; that each of the parties was to receive one-half of the shares of the TV Electronics Fund, Hamilton Fund, Investors Intercontinental Fund, and

Investors Stock Fund; that each party was to receive one-half of the sum on deposit in the name of Jack F. Trahan in the First Federal Savings and Loan Association of San Antonio; that cross-defendant is to receive his gun collection, fishing equipment and personal effects; that cross-defendant is to receive the equity, having no value, in the 1963 Chrysler standing in his name; that each party is to receive one-half of $3,979.00 deposited in the name of Emma Jean Trahan; that each party is to receive one-half of the cash deposited in the name of Emma Jean Trahan in the Lamesa National Bank; that the agreed value of the 1962 Chevrolet Corvair is $1,500.00 and that each party is to receive one-half of the value thereof, with the cross-plaintiff being entitled to receive the automobile and pay the cross-defendant the sum of $750.00 for his interest therein if she desires so to do; that the sum of $3,276.00 deposited in U.S.A.F. Security Service Credit Union in the name of Jeannie Jacqulyn Trahan remain in said credit union in said name with the parties to agree that no withdrawals will be made on said account without the consent of both parties, such withdrawals to be made to meet any emergency or extraordinary medical or dental expenses or for educational purposes, provided that if the parties are unable to agree they may apply to the court for permission to withdraw without the consent of the other party; that both cross-plaintiff and cross-defendant be divested of all right, title and interest in the educational policy with Amicable Life Insurance Company on the name of Jeannie Jacqulyn Trahan, and that all right, title and interest in said policy be vested in the said Jeannie Jacqulyn Trahan, and provided further that when the said Jeannie Jacqulyn Trahan attains the age of 21 years, she shall be entitled to all the sums deposited in her name, then remaining, in U.S.A.F. Security Service Credit Union, outright, without further restrictions, and without the necessity of either party hereto consenting to such

withdrawal; that the cross-defendant agrees to pay all premiums on the Amicable Life Educational policy on Jeannie Jacqulyn Trahan until the same matures; and the court having carefully considered and examined into the proposed property settlement agreement, and it being the opinion of the court, and the court finding that all of the community property of parties is covered thereby, and that proposed settlement is just, fair and equitable, and that the same be approved, it is accordingly ORDERED, ADJUDGED AND DECREED by the court that said property settlement be, and the same hereby is, in all things approved and each of the parties is ordered and directed to execute all necessary instruments, documents and conveyances in order to effectuate the same. It further appearing to the court that the parties have agreed to file a joint income tax return for 1962, and to share equally in any refund due or to pay equally any liability due thereon, it is further ORDERED, ADJUDGED AND DECREED by the court that such agreement be, and the same is hereby approved.

It further appearing to the court that it has been necessary for the cross-plaintiff to employ an attorney to represent her herein, and that said attorney is entitled to a reasonable fee, it is accordingly ORDERED, ADJUDGED AND DECREED by the court that cross-plaintiff recover of cross-defendant, the sum of $500.00 as her reasonable attorney's fees herein, and cross-defendant is ordered and required to pay same out of his share of the community property.

It is further ORDERED, ADJUDGED AND DECREED by the court that the cross-defendant, Jack F. Trahan, pay all costs in this behalf incurred, for which let execution issue.

It is further ORDERED, ADJUDGED AND DECREED by the court that all other relief prayed for by either of the parties is in all things denied.

Signed and entered this 22nd day of January, 1963.

/s/
Judge presiding

O.K.

/s/
Attorney for Plaintiff

/s/
Attorney for Defendant

Points of Error presented to the Texas Court of Appeal, in the present case from the brief in that Court.

POINTS OF ERROR

POINT OF ERROR ONE

It was error for the trial court to deny Appellant's plea of res judicata based on the final judgment in *Trahan* v. *Trahan,* No. C-106 in the Supreme Court of Texas, 626 S.W.2d 485 (Tex. 1981) (original answer, T.11).

POINT OF ERROR TWO

It was error for the trial court to award Appellee a portion of Appellant's retirement benefits because under federal law said benefits belong to Appellant only.

POINT OF ERROR THREE

It was error for the trial court to partition Appellant's military retirement benefits on the basis of 10 U.S.C. § 1408 because this new federal statute is not applicable to this action.

POINT OF ERROR FOUR

It was error for the trial court to enter judgment on the basis of 10 U.S.C. § 1408, as here applied, because the statute, as so applied, takes Appellant's property without compensation and without due process of law in violation of the Fifth and Fourteenth amendments to the United States Constitution.

POINT OF ERROR FIVE

It was error for the trial court to order Appellant to apply $275.00 each month from his share of his retirement pay to apply against the money judgment in favor of Appellee because such is unauthorized by law and is an illegal garnishment of wages.

AFFIRMED 28 FEBRUARY 1985

NO. 10-84-184-CV

Trial Court
#24,561

IN THE

COURT OF APPEALS

FOR THE

TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT WACO

* * * * * * * * * * * * *

JAMES H. POWELL,

Appellant

v.

RUTH ANN POWELL,

Appellee

* * * * * * * * * * * * *

From 85th Judicial District Court
Brazos County, Texas

* * * * * * * * * * * * *

OPINION

* * * * *

This is an appeal from summary judgment decreeing appellee Ruth Ann Powell entitled to recover 46% of the disposable U. S. Air Force retired pay of appellant James H. Powell from and after July 1, 1981, to March 16, 1984, in the amount of $15,441.42; and 46% of appellant's disposable retired pay from and after March 16, 1984.

This is the second time this matter between these parties has been before this court. See Powell v. Powell, CCA (Waco) NRE, 620 S.W. 2d 253.

Appellant James H. Powell entered military service December 3, 1940. Appellant and appellee were married July 26, 1942. Appellant served continuously from December 3, 1940, in the military service until December 31, 1960, since which date he has been retired and drawing military retired pay from the United States government. The parties were divorced on February 2, 1965, in the 85th District Court in Brazos County. The divorce judgment was silent as to any division of the military retirement pay. The parties were married during 222 months of the 241 months of appellant's vested retirement time.

Appellee brought suit in 1979 against appellant seeking judgment for 46% of all retirement pay appellant had received since the divorce, and declaratory judgment that she was entitled to 46% of all appellant's future benefits.

On October 1, 1980, the trial court rendered judgment for appellee for 46% of all retirement pay received by appellant from the date of divorce to date of judgment, plus 46% of all future retirement pay.

Appellant appealed such judgment on 5 points asserting among other matters: 1) the parties were married July 16, 1942, in Illinois (where military retirement benefits are separate property) and lived in such state for nearly eight years; 5) the system of military retirement benefits established by Congress preempts the State of Texas from treating military retirement pay as community property divisible on divorce.

The court held point 5, supra, dispositive of the case, and following the mandate of the United States Supreme Court in McCarty v. McCarty, reversed the trial court's judgment and

rendered judgment that appellee take nothing. Powell v. Powell, supra, on August 6, 1981. Rehearing was denied September 4, 1981, and the Texas Supreme Court refused application (NRE) for writ of error on December 1, 1981.

On September 8, 1982, the United States Congress passed the "Uniform Services Former Spouses Protection Act" (FSPA) which provides in pertinent part:

> "* * * a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court".

On April 7, 1983, appellee Ruth Ann Powell filed this case in the 85th District Court in Brazos County, seeking recovery of 46% of the retirement benefits of appellant after June 26, 1981; and for declaratory judgment for 46% of said retirement benefits to accrue in the future. Appellant answered asserting, among other matters, appellee's claim was barred by res judicata in that on August 6, 1981, this court held appellee "not entitled to any part of [appellant's] military retirement pay". [citing 620 S.W.2d 253, NRE]; that the parties did not live in a community property state during eight years of their marriage; and that the trial court took the military retirement benefits into consideration in dividing the parties' property and setting child support payments in the original divorce decree.

Thereafter appellant moved for summary judgment that appellee take nothing, attaching copies of the trial court judgment of August 6, 1981; this court's judgment reversing such judgment and rendering judgment [appellee] take nothing; and the Supreme Court's order that application for writ of error be refused in such case. Appellee also moved for summary judg-

ment for 46% of appellant's retirement pay from July 1, 1981, to date, plus decree that appellant be ordered to pay 46% of future retirement benefits to appellee.

Appellant filed opposition to appellee's motion for summary judgment asserting, among other matters, the prior case was res judicata of the present case; the parties were not domiciled in a community property state for the entire duration of their marriage which was a fact issue and [would affect the percentage of appellant's military retirement pay appellee was entitled to, if any].

Attached to such opposition was appellant's affidavit that the parties lived in Illinois for nearly 8 years of their marriage; and that the retirement benefits were considered by the divorce court in 1965 in dividing the parties' property and in determining the amount of child support appellant was required to pay. Further attached was the affidavit of Honorable John L. Sandstedt, who represented appellant in the prior case between the parties, to the effect that in the prior case the defenses of residency of the parties [and other defenses] were not reached because the decision was predicated on [Point 5] and the United States Supreme Court's decision in McCarty v. McCarty, 453 U. S. 210.

The trial court on October 2, 1984, overruled appellant's motion for summary judgment; found appellee "is entitled to recover under the Uniform Services Former Spouses Protection Act the disposable retired pay of [appellant] accruing from and after July 1, 1981"; and rendered summary judgment appellee recover 46% of the disposable retired pay accrued and accruing on behalf of appellant from and after July 1, 1981; calculated to March 16, 1984, to be $15,441.82; and further decreed appellee recover 46% of appellant's retirement pay after March 16, 1984.

Appellant appeals on 7 points.

1) The trial court erred in overruling [appellant's] motion for summary judgment based on the final judgment in Powell v. Powell, CCA (Waco) NRE, 620 S.W.2d 253, which bars appellee's suit under the doctrine of res judicata.

2) The trial court erred in granting [appellee's] motion for summary judgment based on the Uniform Services Former Spouses Protection Act because the act is not applicable to the parties in this case.

3) The trial court erred in granting [appellee's] motion for summary judgment because the FSPA as applied in this case takes appellant's property without compensation and without due process of law in violation of the 5th and 14th Amendments to the U. S. Constitution.

4) The trial court erred in overruling [appellant's] motion for summary judgment because the FSPA as applied in this case takes appellant's property without due process of law in violation of the 5th and 14th Amendments to the U. S. Constitution.

5) The trial court erred in granting [appellee's] motion for summary judgment because the Uniform Declaratory Judgment Act is inapplicable to the controversy in this case.

Res judicata will operate as a bar only to matters *actually* raised or that could have been raised in the previous litigation. Abbott Laboratories v. Garvis, S. Ct., 470 W. W. 2d 639. As to matters which arise subsequently, the prior judgment will not be res dudicata. Fort Worth Stockyards Co. v. Brown, CCA (Ft. Worth NWH, 161 S. W. 2d 549; Franklin v. Rainey, CCA (Dallas) NWH, 556 S.W. 2d 583. Our Supreme Court expresses

the rule thusly: "The judgment is res judicata only of present and not future conditions." Cowling v. Collegan, S. Ct., 312 S.W.2d 943.

The enactment by Congress of the FSPA created a new fact, a change in the law and new cause of action. See also: Munchard v. Berenson, 307 F.2d 363; State Farm Mutual Auto Ins. Co. v. Duel, 324 U. S. 154; U. S. v. Lubbock Ind. Sch. Dist., 445F. Supp. 1223; Colorado Co. Fed. S&L Assn. v. Lewis, CCA (Austin) NRE, 498 S. W. 2d 723.

The Declaratory Judgment Act provides a plenary remedy. United Service Life Ins. Co. v. Delaney, S. St., 396 S.W.2d 855. We think the act properly applicable here where a controversy exists as to the rights of parties under the FSPA and Texas law.

Appellant's points 1 through 5 are overruled.

6) The trial court erred in granting [appellee's] motion for summary judgment in that appellee's summary judgment proof did not establish appellee's entitlement to judgment as a matter of law.

7) The trial court erred in granting summary judgment because the FSPA and Judgment Act as applied to this case denies appellant due process and equal protection guaranteed by the 5th and 14th Amendments to the U.S. Constitution.

Appellant contends under these points that the trial court's award of 46% of appellant's retirement pay to appellee is unsupported by the summary judgment evidence; that his affidavits raise fact issues as to the correct percentage of appellee's entitlement [if any] by showing the parties lived some [8 or 13] years of the marriage in separate property states for which reason the amount of military retirement pay acquired by appel-

lant while domiciled in a separate property state should be considered appellant's separate property.

We reject this contention. Our Supreme Court in Cameron v. Cameron, 641 S.W.2d 210 in an almost identical factual situation stated: "We recognize that property acquired in common law jurisdiction has historically been termed 'separate' property, but we hold that the property spouses acquire during marriage, except by gift, devise or descent should be divided upon divorce in Texas in the same manner as community property, irrespective of the domicile of the spouses where they acquire the property". In Cameron, entitlement to military retirement pay [and bonds] was all or part acquired while the spouses were living in separate property states. The Supreme Court rendered judgment awarding the wife her share of the military retirement pay, but only from June 25, 1981. Appellant contends his defense that the trial court took the military retirement benefits into consideration when dividing the parties' property and fixing child support payments cannot be adjudicated here by summary judgment. The military retired pay was not divided or mentioned in or by the divorce decree in 1965. Thus the husband and wife became joint owners thereof. Busby v. Busby, S.Ct., 457 S.W.2d 551.

The trial court's judgment awarded appellee 46% of appellant's disposable retired pay from and after July 1, 1981, to March 16, 1984, and calculated same as being *$15,441.82;* and further ordered appellant and the Secretary of the Air Force or his authorized agent to pay appellee 46% of all appellant's disposable retirement pay from and after March 16, 1984.

Appellant complains of the amount of the judgment and asserts it differs from the amount asked for in appellee's motion for summary judgment, and does not address the amount of actual taxes paid by appellant.

The FSPA defines "Disposable Retired Pay" as the total retired pay to which the member is entitled less [as pertinent here] amounts which are properly withheld for federal income tax purposes, are deducted as government life insurance premiums, and are deducted because of an election to provide for an annuity for a spouse.

The summary judgment record before us reflects in appellant's answers to appellee's interrogatories the amounts of retired pay received by appellant for the pertinent periods and the amounts withheld by the government for survivor's benefit, income tax and allotment for life insurance. The careful trial judge computed the judgment to $15,441.41, by deducting the survivor's benefit, federal income tax withheld and life insurance allotment from the total of the check appellant received.[1]

Points 6 and 7 are overruled.

AFFIRMED

/s/

FRANK G. McDONALD
Chief Justice

DO NOT PUBLISH

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[1] Appellee is probably entitled to 46% of the amount of the checks actually received by appellant because the survivor's benefit, income tax, and insurance allotment, have been withheld from appellant's total entitlement, and the check he receives represents his disposable retired pay, (which for the period involved we calculate to be $19,736.14), but appellee presents no point on this.

(2)

No. 85-1050

Supreme Court, U.S.
FILED
JAN 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

JACK F. TRAHAN,
Appellant,

v.

EMMA J. TRAHAN,
Appellee.

On Appeal From The Court Of Appeals Of Texas For The Third Supreme Judicial District

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED BY APPELLANT

1. Is the application of Texas community property and partition laws to a 1963 divorce, thereby dividing military retirement benefits previously vested solely in Appellant by federal law and final judgment applying such federal law, repugnant to the Constitution and laws of the United States?

2. Did the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408, annul the decision of this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981) in its entirety and retroactively permit establishment of state community property concepts in place of the pre-emptive federal statutory plan described in *McCarty* so as to permit partition of retirement benefits arising from a marriage that ended in divorce in 1963?

3. Is the award of a money judgment against Appellant under the facts of this case a taking without compensation or a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16.1, Subsections (b) and (c), moves the Court to dismiss the appeal on the ground that it does not present a substantial federal question; and to affirm the judgment on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

———o———

OPINION BELOW

The Opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is reported at 682 SW2d 332. The denial of review by the Texas Supreme Court and the refusal of rehearing by the Texas Supreme Court were without opinion.

———o———

STATEMENT OF THE CASE

Appellant served in the United States Army during his marriage to Appellee, and he thereby became entitled to military retirement benefits. Appellant and Appellee were divorced on January 22, 1963. The judgment of divorce made no mention of Appellant's military retirement benefits.

On February 14, 1977, Appellee filed suit to partition the military retirement benefits. Judgment was rendered in favor of Appellee and affirmed by the Texas Court of Appeals in *Trahan v. Trahan,* 609 SW2d 820 (Tex. Civ. App.—1980, error granted).

While the case was pending on Application for Writ of Error in the Texas Supreme Court, this Court decided *McCarty v. McCarty,* 453 U.S. 210 (1981). Based upon the decision in *McCarty,* the Texas Supreme Court reversed Appellee's judgment. *Trahan v. Trahan,* 626 SW2d 485 (Tex. 1981).

On September 8, 1982, Congress passed the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408 (hereinafter referred to as "USFSPA"). On February 10, 1983, Appellee filed the instant suit for partition. Judgment was rendered in favor of Appellee, and affirmed in the opinion below, *Trahan v. Trahan,* 682 SW2d 332 (Tex.Ct.App.—1984). The Texas Supreme Court refused Appellant's Application for Writ of Error without opinion on June 12, 1985.

———o———

ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257 (2).

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

2. USFSPA nullifies the effect of the *McCarty* decision and permits state courts to deal with military retirement benefits in accordance with local law.

3. The award of military retirement benefits to appellee does not violate any Fifth or Fourteenth Amendment rights of appellant.

BRIEF OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

Appellant asserts jurisdiction under 28 U.S.C. Section 1257 (2), claiming that the Texas community property statutes have been applied in a way repugnant to the laws of the United States. He relies upon *McCarty v. McCarty*, 453 U.S. 210 (1981).

The basis of appellate jurisdiction in *McCarty* was the same as the basis of the holding. This Court concluded that the federal statute on military retirement benefits then in existence pre-empted state community property laws with respect thereto, and that state divorce courts were accordingly precluded by the Supremacy Clause from dividing such benefits. 453 U.S. at 219 n. 12.

In reaching this conclusion, the Court concluded that there was a conflict betweeen the terms of the federal retirement statutes as they then existed, and the state community property rights; and that the state community property rights, as applied, injured the objectives of the federal retirement program as it then existed. Ibid at 232.

Since the decision in *McCarty,* however, Congress has enacted the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408. The USFSPA gives specific rights to former spouses, such as Appellee herein, in the military retirement benefits of servicemen. The principal entitlement of former spouses is set forth in Section 1408(c)(1):

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

By this legislation, Congress has specifically granted to state divorce courts that authority which *McCarty* preempted them from exercising. There is thus no longer a conflict between state and Federal laws. The jurisdictional basis asserted by Appellant, namely, that the community property laws are repugnant to the Federal retirement laws, no longer exists.[1]

---

1. This Court denied a Petition for Certiorari in a case involving similar questions to the instant case. *Jett v. Jett,* 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 U.S. 2215 (No. 84-1375, April 22, 1985).

Indeed, this Court forecast in *McCarty* that, "Congress may well decide . . . that more protection should be afforded the former spouse of a retired servicemember. This decision, however, is for Congress alone". 453 U.S. 235.

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

[See brief or argument under I., above.]

2. USFSPA nullifies the effect of the McCarty decision and permits state courts to deal with military retirement benefits in accordance with local law.

The Court below correctly held that the purpose of the USFSPA is to reverse the effect of the *McCarty* decision. *Trahan v. Trahan,* 682 SW2d 332, 334 (Tex. Ct. App.—Austin, 1984, writ ref'd n.r.e.), citing *Cameron v. Cameron,* 641 SW2d 210, 212 (Tex. 1982).

The holding is amply supported by the legislative history. The opinion below quotes extensively from the Senate Report No. 502, *Trahan v. Trahan,* supra, p.335, which includes the following observation:

> The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what it was when the courts were permitted to apply state divorce laws to military retired pay.

Most of the state courts which have construed the USFSPA have reached the same conclusion. See, for ex-

ample, *In re Marriage of Hopkins,* 191 Cal.Rptr. 70 (Cal Ct. App. 1983); *Smith v. Smith,* 458 A2d 711 (Del. Fam. Ct. 1983); *Walentowski v. Walentowski,* 672 P2d 657 (NM 1983); *De Gryse v. De Gryse,* 661 P2d 185 (Ariz. 1983); *In re Smith,* 669 P2d 448 (Wash. 1983); *Castiglioni v. Castiglioni,* 471 A2d 809 (N.J. Super. 1984); *Jett v. Jett,* 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 S.Ct. 2115 (No. 84-1375, April 22, 1985).

Indeed, even the two cases cited in Appellant's Jurisdictional Statement, *Moller v. Moller,* 356 NW2d 909 (S.D. 1984) and *Bishir and Britt v. Bishir,* 84-SC-809-DG, slip opinion October 31, 1985, 12 FLR 1035 (Ky. 11-19-85), do not take a contrary view. Both of these cases involved a request to reopen divorce judgments final before the *McCarty* decision. The Courts declined to do so, but solely on the basis of local law, not on the basis of any construction of the USFSPA or *McCarty.*

Appellant makes various complaints about the way in which the Texas court applied its community property law. In so doing, Appellant misses a fundamental thrust of the USFSPA, which is that a state "court may treat disposable retired or retainer pay . . . in *accordance with the law of the jurisdiction of such court.*" 10 U.S.C. Section 1408(c) [italics added]. The legislative history makes clear that "The provision is intended to remove the federal pre-emption found to exist by United States Supreme Court and permits State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable." Senate Report No. 502, quoted in the opinion below, 682 SW2d at page 335.

This also disposes of Appellant's complaint that the decisions of some states are in conflict. The USFSPA permits diverse treatment "in accordance with local law". Section 1408(c)(1). This Court has repeatedly recognized that "the whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890), quoted in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and in *McCarty*, 453 U.S. 210, 212.

Appellant also argues that, even if *McCarty* is no longer effective today, it still has retroactive effect prior to 1981. To the contrary, Congress obviously intended that the USFSPA should nullify *McCarty* altogether.[2] This is apparent from the basic entitlement section, Section 1408(c)(1), quoted above. The Section selects as the beginning date June 25, 1981 which was the day prior to the date on which the decision in *McCarty* was handed down.

Indeed it seems that virtually every court which has addressed the issue of whether *McCarty* was intended to be retroactive, has held that it is not retroactive, many cases so holding even before the USFSPA had passed. *Segrest v. Segrest*, 649 SW2d 610 (Tex. 1983); *McGinn v.*

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2. Indeed, if the Texas Court of Appeals made any error at all, it was in refusing Appellee's cross-point of error. Appellee complained that the trial court should have granted her judgment for her share of the military retirement benefits back to 1965, when Appellant began receiving them; instead of granting her judgment only back to June 25, 1981, the date prior to the *McCarty* decision. Appellee argued that since the USFSPA nullified *McCarty*, prevailing Texas law entitled her to recover her share from the date when Appellant began receiving the benefits. *Cearley v. Cearley*, 544 SW2d 661 (Tex. 1976); *Taggart v. Taggart*, 552 SW2d 422 (Tex. 1977).

McGinn, 337 NW2d 632 (Mich. Ct. App. 1983); *Erspan v. Badgett,* 659 F2d 26 (5th Cir. 1981); *Rodriquez v. Rodriquez,* 133 Ariz. 88, 649 P2d 291 (Ariz. Ct.App. 1982); *In re Marriage of Fellers,* 125 Cal.App.3d 254, 178 Cal.Rptr. 35 (Cal. Ct.App 1981); *In re Marriage of Allcock,* 107 Ill.App.3d 150, 62 Ill. Dec. 865, 437 NE2d 392 (Ill. Ct.App. 1982); *Whenry v. Whenry,* 652 P2d 1188 (N.M. 1982); *In re Marriage of Vinson,* 644 P2d 635 (Ore Ct. App. 1982).

Appellant also argues that the USFSPA is not intended to permit a "reopening" of court orders decided before the *McCarty* decision, and he cites a fragment of the House Conference Report. Appellant's Jurisdictional Statement pp. 16-18. This fragment of the House Conference Report is inconsistent with the majority of the legislative history, and does not seem to express the true intent of Congress. The overriding intent of the USFSPA is to nullify all effects of the *McCarty* decision, and to let each state court deal with military retirement benefits in accordance with the law of the local jurisdiction.

But even assuming arguendo, that Congress did not intend to permit the "reopening" of court orders decided prior to *McCarty,* the present action is not a suit "to reopen" in the usual sense of that word. This is a *partition* action, which, in its very essence, does not seek to "reopen" a prior order or case. The theory of a partition action in the context of divorce is that former spouses become tenants-in-common as to any assets not divided in their divorce decree. As tenants-in-common, they are entitled to seek a subsequent partition of their co-tenant estate. A partition action has always been regarded under Texas law as something quite distinct from a bill of review

or other action seeking to reopen or modify a prior judgment. *Yeo v. Yeo,* 581 SW2d 734, 736 (Tex.Ct.App. 1979, writ ref'd n.r.e.).

The Court below correctly decided the res judicata issue in holding that, "'The judgment in [the prior] case was res adjudicata only of the issue then presented of the facts as they then appeared *and of the legislation then existing.' State v. Powell,* 134 SW2d 746, 748 (Tex. Civ. App. 1910, writ ref'd), quoting *Utter v. Franklin,* 172 U.S. 416 (1899) (emphasis added). See also *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980)."

Appellant argues that the "legislative nullification" exception to the res judicata doctrine applies only in cases where "public rights" are involved. Assuming *arguendo* that this is correct, it has long been held by both Federal and Texas courts that a government pension is a "public right", and that a public employee has no vested rights in the statutory pension. *Dodge v. Board of Education,* 302 U.S. 74, 82 L.Ed. 57, 58 S.Ct. 98 (1937); *Stouper v. Jones,* 284 F2d 240 (D.C. Ct. App. 1960); *Dallas v. Trammell,* 129 Tex. 150, 101 SW2d 1009 (Tex. 1937).

3. The award of military retirement benefits to Appellee does not violate any Fifth or Fourteenth Amendment rights of Appellant.

Appellant had no exclusive property right in his military retirement benefits at the time of his divorce in 1963. Under Texas law, military retirement benefits were community property at that time. *Kirkham v. Kirkham,* 335 SW2d 393 (Tex.Ct.App.—San Antonio, no writ).

The only case cited by Appellant is *U.S. v. Larionoff,* 431 U.S. 864 (1977). In *Larionoff,* this Court held that

naval personnel were entitled to re-enlistment bonuses based upon regulations in effect at the time they signed a re-enlistment agreement with the Navy, despite the fact that the Navy subsequently changed the terms of the bonus by regulation. It is important to note that the decision in *Larionoff* (a narrow 5-4 vote), turned on the fact that the benefit involved, a reenlistment bonus, was based upon a specific re-enlistment agreement between the government and the particular servicemen involved, which created contractual rights. In addition, this Court expressly declined to base its holding on any constitutional grounds, but rather based the decision on a construction of congressional intent.

To the undersigned counsel's knowledge, the United States Supreme Court has never held that Congress cannot alter the terms of governmental pensions by subsequent legislation. To the contrary, the Federal Courts of Appeals have upheld the action of Congress in altering government pension rights on several occasions. *Stouper v. Jones,* 284 F2d 240 (D.C. Ct.App. 1960); *Costello v. United States,* 587 F2d 424, 426 (Ct.App.—9th Cir., 1978), cert. den., 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed.2d 296 (1979).

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CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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